IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-363

MICHAEL GRASSO, JR., *Petitioner,*

*v.*

UNITED STATES OF AMERICA

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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MICHAEL GRASSO, JR., *Petitioner*,

*v.*

UNITED STATES OF AMERICA

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner, Michael Grasso, Jr., respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit, entered on August 2, 1978.

## OPINION BELOW

The Judgment Order of the United States Court of Appeals for the Third Circuit, which is unreported, appears in the Appendix hereto. Neither the Court of Appeals nor the United States District Court for the Eastern District of Pennsylvania rendered Opinions in this matter.

## JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on August 2, 1978. Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, the Court of Appeals ordered on August 10, 1978 that issuance of the judgment and mandate be stayed until September 1, 1978. A copy of such Order appears in the Appendix hereto. This Petition for a Writ of Certiorari

was filed within 30 days of August 2, 1978 and on or before September 1, 1978. The jurisdiction of the United States Court of Appeals for the Third Circuit was based upon Title 28 U.S.C., §1291 which authorizes appeals from judgments of sentence entered by District Courts. The jurisdiction of this Court is invoked under Title 28 U.S.C., §1254(1).

## QUESTION PRESENTED

Is a Defendant in a federal criminal case entitled at least to a hearing on a motion to dismiss an indictment where the Prosecutor wrote and inserted the charge in the indictment despite the fact that (a) no evidence was presented to the grand jury that defendant was guilty of the offense, (b) such evidence as was presented to the grand jury affirmatively exculpated the defendant, and (c) critical additional exculpatory evidence in the possession of the Government was not presented to the grand jury?

## CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part that:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . ."



## STATEMENT OF THE CASE

Petitioner and three co-defendants were tried originally before the Honorable Joseph S. Lord, III, Chief Judge of the United States District Court for the Eastern District of Pennsylvania, sitting without a jury, upon an indictment charging each defendant with 34 counts of mail fraud in violation of Title 18, U.S.C. §1341 and two counts of racketeering activity in violation of Title 18, U.S.C. §1962. After a lengthy trial, Judge Lord convicted one co-defendant on various counts, acquitted two co-defendants entirely and acquitted Petitioner of 35 of the 36 counts. Petitioner was convicted on Count 18, a mail fraud count, and was the only defendant convicted on that count.

The evidence at the original trial with respect to Count 18 may be summarized briefly, as follows:

Officers of Allegheny Contracting Industries, Inc. (Allegheny) testified that in December, 1974, Petitioner was asked to attempt to obtain for Allegheny surety bonds to assure performance and payment in connection with a construction contract between Allegheny and the Pennsylvania Department of Transportation (PENDOT). (170a) The bonds were obtained from Wisconsin Surety Company and Allegheny paid Petitioner $15,000, of which $6,000 was premium and $9,000, a fee. (822a-824a)

Eric Moss, President of Wisconsin Surety Company testified that PENDOT subsequently rejected one of four reinsurers on the bonds because it was not licensed in Pennsylvania. On January, 10, 1975, Moss mailed a reinsurance form to Grasso for the purpose of having Grasso obtain the needed reinsurance. Although in January, 1975 Grasso resided and had his offices in Miami, Florida, the letter was addressed (Gov. Exh. 19, 826a-29a) as follows:

> Mike Grasso
> MOUNT VERNON AGENCY, INC.
> 3001 North Fulton Drive
> Suite 809
> Atlanta, Georgia 30305

This was not and never was Petitioner's address. (701a-03a; 948a-52a; 1233a-34a) It was this mailing that was alleged in Count 18 to have been for "the purpose of executing the scheme to defraud".

Daniel Culnen testified that in January, 1975, at the office of Petitioner in Miami, Florida, Culnen executed the reinsurance document on behalf of Summit Insurance Company at the request of Petitioner who knew that Culnen had been enjoined preliminarily from executing insurance on Summit. (376a-79a; 850a-51a)

It was stipulated that the reinsurance document executed on behalf of Summit Insurance Company and signed by Daniel Culnen was filed with PENDOT on January 16, 1975. Culnen's signature on this form was dated in his handwriting "May 10, 1974".

It was on this evidence that Judge Lord convicted Petitioner on Count 18 at the first trial. The evidence conformed precisely to a detailed description of the offense contained in the Indictment.

Thereafter, Judge Lord granted Petitioner a new trial on the basis of newly discovered evidence. The retrial was limited to Count 18 because he had acquitted the Petitioner on the 35 other counts at the first trial.

Prior to the commencement of the second trial, Petitioner filed a timely Motion to Dismiss the Indictment for Abuse of Grand Jury Procedures. The motion was based entirely on undisputed evidence introduced in the Government's case at the first trial and disclosed by the Government after the first trial had ended. (950a-52a) The factual bases for the Motion to Dismiss were as follows:

At the first trial Daniel Culnen admitted he had testified only once at the grand jury. (490a-91a) His testimony was that the reinsurance forms had been signed by him in blank on May 10, 1974 and was one of several such forms furnished by Culnen to Wisconsin in 1974. He denied repeatedly that Petitioner ever had requested that



he sign the forms in January, 1975 or at any other time. (475a-89a; 601a-06a)

Mr. Moss had testified before the grand jury only that he "thought" the January 10, 1975 letter transmitting the reinsurance forms were mailed to Petitioner. (951a)

With respect to the manner in which the January 10, 1975 letter was addressed, the Postal Inspector assigned to the case had in his possession three months prior to the Indictment, a memorandum reflecting an investigation by the United States Postal Service which set forth the following in paragraph 4 thereof (948a-49a):

> "4. Mount Vernon Surety Company was placed in receivership by the State Insurance Commissioner in December, 1972. It is understood that the offices at 3001 North Fulton Drive were vacated shortly thereafter. Inquiry of the carrier serving 3001 North Fulton Drive disclosed Mount Vernon Agency, Inc., was not located in Suit 809 at that address in January, 1975 when your letter in question, addressed to Mike Grasso at that address, was mailed. The carrier further advised that no forwarding order was on file for Mount Vernon Agency, Inc., and that he had never heard the name Mike Grasso. Sidney Shine occupies Suit 819 at 3001 North Fulton Drive and may have had some connection with Grasso at that time and in view of his connections with Mount Vernon Surety Company, the letter conceivably could have been delivered to him although the carrier feels to the contrary."

It is conceded that neither the memorandum, nor the information contained therein, was ever brought to the attention of the grand jury of the Prosecutor.

In summary, the only evidence the grand jury heard with respect to Count 18 was the testimony of Culnen that the reinsurance form was executed on May 10, 1974 and that Petitioner was entirely uninvolved. Culnen's testimony

was supported by the May 10, 1974 date which appeared on the form below his signature in his handwriting.

The grand jury also had the testimony of Moss that he "thought" the reinsurance forms were mailed on January 10, 1975. However, the Postal Inspector in this case knew, but never informed the grand jury or the Prosecutor's office until after the Indictment that the Moss letter was sent to a vacant suite in Georgia for which there was no forwarding order on file, and as to which Petitioner had no connection.

In spite of the fact the evidence before the grand jury was wholly exculpatory of Petitioner on this Count, the indictment details a contrary version upon which the Petitioner was tried at the second trial. The origin of this contrary version also is clear. *After* Culnen testified before the grand jury, but *before* the Indictment, Culnen recanted his grand jury testimony in an "off the record" statement to an Assistant United States Attorney in which he stated for the first time that Petitioner had solicited him in Miami to sign the reinsurance forms January, 1975. (608a-09a) The recantation never was presented to the grand jury. Instead, the recantation simply was written into the Indictment by the Assistant United States Attorney.

It was on this record that the District Court denied without a hearing Petitioner's timely motion to dismiss the indictment. Thereafter, Petitioner was found guilty at the second trial and sentenced to a term of 6 months in prison and 4½ years probation.



## REASONS FOR GRANTING THE WRIT

### I. The Decision of the Court Below Conflicts With Decisions In The Second and D.C. Circuits In That It Emasculates The Fifth Amendment Right To Grand Jury Indictment By Approving An Indictment Written By The Government On The Basis of Evidence Never Presented To The Grand Jury And In Disregard Of Exculpatory Evidence Concealed From The Grand Jury.

At the beginning of this decade, there was considerable debate whether the grand jury should be retained or abolished as an anachronism which had become simply an arm of the prosecutor. Compare Younger, *The People's Panel* (1963) with Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A.J.153 (1965) and Campbell, *Eliminate The Grand Jury*, 64 J.Crim.L.C. 174 (1973).

This debate effectively has been ended by a series of decisions in which this Court has expanded the investigatory powers of federal grand juries virtually to the outermost limits. See, *e.g. United States* v. *Dionisio*, 410 U.S.1, 93 S.Ct. 764; *United States* v. *Calandra*, 414 U.S. 338, 94 S.Ct. 613 (1974); *Branzburg* v. *Hayes*, 408 U.S. 665, 92 S.Ct. 2646 (1973); *United States* v. *Mandujano*, 425 U.S. 564, 96 S.Ct. (1976). In each instance, the rationale for entrusting such powers to grand juries has been the safeguards inherent in the nature of the grand jury as an "independent body of citizens" charged with the duty to stand as a "shield" between the Government and the accused.

While prosecutors have been urging the continued expansion of the investigatory powers of grand juries, they have in practice sought to limit and encroach upon the independence of grand juries in the performance of their "shielding" function. Thus, the rationale for both the in-

vestigatory and shielding functions of grand juries is under continual threat of erosion.

This Court having made the decision to reaffirm and bolster the powers of federal grand juries, it is essential that there be equal reinforcement of the independence and integrity of grand juries against the natural tendency of prosecutors to dominate them. Most Courts of Appeal have recognized this imperative either explicitly or implicitly. However, the Third Circuit stands out as one court which adheres to traditional rules rendering the grand jury little more than a "rubber stamp" of the prosecutor. The leading Third Circuit case in this area is *United States ex rel Almeida* v. *Rundle*, 383 F.2d 421 (1967). In that case, there was concealed from the grand jury evidence that the bullet which killed a police officer was fired by another police officer and not the defendant. Holding that "an indictment returned by a legally constituted nonbiased grand jury, . . . is enough to call for a trial. . . .", and stating that an indictment may be founded on "tainted" evidence, the court brushed aside Almeida's constitutional claims. In the present case, the Government relied on *Almeida* in the Court of Appeals and both the District Court and the Court of Appeals, during oral argument, stated that Third Circuit precedents precluded an inquiry into the constitutional claims presented here.

By contrast, Courts of Appeals in other than the Third Circuit have been sensitive to the need to assure that the grand jury does not become simply the "rubber stamp" many defense attorneys and scholars claim it is. Thus, in *Gaither* v. *United States*, 413 F.2d 1061 (D.C. Cir. 1969), the Court reviewed the indicting procedure followed in the District of Columbia under which the grand jury heard the evidence and then voted to "present" the defendants for a crime. The "Presentment" consisted of a bare statement that the defendant committed a named offense, and was signed by the foreman of the grand jury. Thereafter, an Indictment was drafted by an Assistant United States



Attorney which was signed by the foreman of the grand jury without any further consideration by the jurors themselves.

The Court held that although it was proper for an Assistant United States Attorney to draft a Bill of Indictment, a "true" Bill could be returned only after the Bill of Indictment was considered by the jurors. Judge Wright emphasized that the grand jury was intended to be a "shield" between the Government and its citizens, as follows (413 F.2d at 1066):

> "The Fifth Amendment requires that an indictment be brought by a grand jury. The grand jury is interposed 'to afford a safeguard against oppressive actions of the prosecutor or a court'. The decision to hale a man into a court is a serious one, subject to official abuse. For this reason, 12 ordinary citizens must agree upon an indictment before a defendant is tried on a felony charge. The content of the charge, as well as the decision to charge at all, is entirely up to the grand jury—subject to its popular veto, as it were. The grand jury's decision not to indict at all, or not to charge the facts alleged by the prosecutorial officials, is not subject to review by any other body.
>
> The sweeping powers of the grand jury over the terms of the indictment entail very strict limitations upon the power of prosecutor or court to change the indictment found by the jurors, or to prove at trial facts different from those charged in that indictment. Since the grand jury has unreviewable power to refuse indictment, and to alter a proposed indictment, proof at trial of facts different from those charged cannot generally be justified on the ground that the same facts were before the grand jury and that the jurors might or even should have charged them."

After reviewing the Supreme Court cases condemning amendments and "constructive" amendments of indictments, Judge Wright concluded (413 F.2d at 1071):

> "We conclude then that Rule 6 requires the grand jury as a body to pass on the actual terms of an indictment. We are impelled to this conclusion largely by the constitutional principles of *Bain*, *Stirone* and *Russell*, which emphasize the right of the accused to be tried on an indictment which has in each material particular been approved by a grand jury. Thus, it follows that the bringing of an indictment under the procedure followed in this case was error."

The vice in the *Gaither* case was the circumvention by the Government of the safeguard that a grand jury, and *not the prosecutor*, evaluate the evidence and make the decision whether to charge. Other cases, particularly in the Second Circuit, recently have reaffirmed the determination of the courts to protect the independent and meaningful screening function of the grand jury against usurpation by overzealous prosecutors. Thus, in *United States* v. *Estepa*, 471 F.2d 1132 (2 Cir. 1972), the Court exercised its supervisory powers to prohibit undue reliance upon the presentation of hearsay evidence, and an indictment was dismissed where the prosecutor did not expressly inform the grand jurors that the evidence presented was hearsay. The Court stated (471 F.2d at 1135):

> "We have previously condemned the casual attitude with respect to the presentation of evidence to a grand jury manifested by the decision of the Assistant United States Attorney to rely on testimony of the law enforcement officer who knew least, rather than subject the other officers, or himself, to some minor inconvenience."

The Court then admonished that (471 F.2d at 1136):

> "When the framers of the Bill of Rights directed in the Fifth Amendment that 'No person shall be held to answer for a capital, or other infamous crime, unless on a presentation or indictment of a Grand Jury', they were not engaging in a mere verbal exercise."



See also *United States* v. *Pastor*, 419 F.Supp. 1318 (S. D. N. Y. 1976).

Another line of recent cases seeks to preserve the review function of the grand jury by requiring the prosecution to bring to the attention of the grand jury events subsequent to the testimony of a witness which affect the credibility of such witness. See *United States* v. *Basurto*, 497 F.2d 781, 785-87 (9 Cir. 1974); *United States* v. *Provenzano*, 440 F.Supp. 561 (S. D. N. Y., 1977); *United States* v. *Gallo*, 394 F.Supp. 310 (D. Conn. 1975).

Nor may prosecutors suppress evidence undermining the credibility of witnesses. *Loraine* v. *United States*, 396 F.2d 335 (9 Cir. 1968); *United States* v. *Samango*, 450 F.Supp. 1097 (D. Hawaii 1978). Finally, if the Government knows that a witness before the grand jury has committed perjury, it may not permit the grand jury to indict on such perjured testimony even if there is sufficient other evidence. *United States* v. *Goldman*, 451 F.Supp. 518 (S. D. N. Y. 1978).

These relatively new developments complement the ancient safeguard against indictment by a grand jury on "no evidence". While a reluctance to delay or intervene in the grand jury process precludes the courts from considering the admissibility, competence or sufficiency of the evidence (*United States* v. *Calandra*, 414 U.S. 338 (1974)), no court ever has upheld an indictment based upon "no evidence" of one or more of the essential elements of the offense.

The classic statement of the "no evidence" rule was by Judge Learned Hand in *United States* v. *Costello*, 221 F.2d 668 (2 Cir. 1955). Judge Hand held that an indictment may properly be based on hearsay, but also said (221 F.2d at 677):

> "We should be the first to agree that, if it appeared that no evidence had been offered that rationally established the facts, the indictment ought to be quashed; because then the grand jury would have in substance abdicated."

This Court affirmed the Costello holding that an indictment may not be quashed based on hearsay evidence. *Costello* v. *United States*, 350 U.S. 359 (1956). Although the court did not have occasion to comment on Judge Hand's dictum regarding "no evidence", Mr. Justice Burton, in a concurring Opinion, specifically stated (350 U.S. at 409):

> "I agree with Judge Learned Hand that 'if it appeared that no evidence had been offered that rationally established the facts, the indictment ought to be quashed; because then the grand jury would have in substance abdicted'."

See also *Brady* v. *United States*, 24 F.2d 405 (8 Cir. 1928).

In the present case, virtually everyone of the recent safeguards fashioned in other circuits was violated. First, the charge was based on "no evidence". Second, critical exculpatory evidence in the possession of the Government which discredited the testimony of Moss that he mailed the letter on January 10, 1975, and that Petitioner ever received the letter, was never presented to the grand jury.

Indeed, it is obvious that Count 18 was drafted by an Assistant United States Attorney on the basis of the "off the record" statement given by Daniel Culnen *after he had exculpated* Petitioner before the grand jury. The Government never has denied this fact. Instead, the Government has contended in the courts below that the grand jury somehow "could have inferred" the commission of the entire offense solely from the testimony of Moss that he "thought" he mailed the reinsurance forms on January 10, 1975.



There are three obvious answers to the Government's position. First and most importantly, any inference from this fact alone that Petitioner solicited Culnen to fraudulently execute the form is utterly impossible and patently absurd. Second, the Government ignores the fact that it concealed from the grand jury evidence that the Moss mailing was misaddressed to a vacant suite with which Petitioner had no connection. Having concealed information from the grand jury which bears directly on whether the forms in fact were mailed on January 10, 1975, or received by Petitioner in January, 1975, the Government cannot be heard to contend that Count 18 could have been constructed by the grand jury solely from the fact that the mailing did occur in January, 1975. Finally, the Government *knows* what really happened. The fact that the Assistant United States Attorney drafted the Indictment on the basis of the recantation statement has been alleged repeatedly, without contradiction, and is obviously true. *Thus, the Government has a duty to Petitioner and to this Court to admit the truth and not urge this Court to infer falsely that the grand jury somehow constructed Count 18 from Mr. Moss's testimony alone.*

The role of the grand jury as a "shield" between the Government and its citizens is mandated in federal criminal procedure by the Fifth Amendment to the Constitution. When critics call the grand jury a "rubber stamp", its staunchest defenders as an "independent body of citizens" are federal prosecutors who value its potent investigating powers and cloak of secrecy. The other side of the coin must be that prosecutors cannot bypass this "independent body of citizens" where its function is to protect citizens against false or flimsy accusations. It is submitted that this case presents a perfect vehicle by which this Court might mandate that all of the Circuits join those Circuits in which the integrity of the institution of the grand jury is being reaffirmed and strengthened against those who would make it truly a rubber stamp.

## CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit on the question presented herein.

Respectfully submitted,

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## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1037

UNITED STATES OF AMERICA

*v.*

MICHAEL GRASSO, JR., *Appellant*

On Appeal from the United States District Court for the Eastern District of Pennsylvania, Crim. No. 76-505-1.

Argued July 25, 1978

Before: ADAMS, WEIS and HIGGINBOTHAM, *Circuit Judges.*

### JUDGMENT ORDER

After consideration of the contentions raised by appellant, namely, that the judgment of the district court should be reversed because (1) the evidence adduced at trial was fatally at variance with the indictment and constituted an impermissible "constructive amendment" of the indictment; (2) the grand jury procedures were abused, and thus the indictment should be dismissed; and (3) the evidence was insufficient to establish the requisite elements of the offense of mail fraud as contained in 18 U.S.C. §1341, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

/s/
*Circuit Judge*

ATTEST:

/s/
*Acting Clerk*

Dated: August 2, 1978

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1037

UNITED STATES OF AMERICA

*v.*

MICHAEL GRASSO, JR., *Appellant*

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until September 1, 1978.

/s/
*Circuit Judge*

Dated: August 10, 1978

No. 78-363

# In the Supreme Court of the United States

OCTOBER TERM, 1978

MICHAEL GRASSO, JR., PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The judgment order of the court of appeals (Pet. App. A) is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on August 2, 1978. The petition for a writ of certiorari was filed on August 31, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the indictment should have been dismissed because of the prosecutor's alleged abuse of the grand jury process.

## STATEMENT

Following a bench trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on one count of mail fraud, in violation of 18 U.S.C. 1341.[1] He was sentenced to six months' imprisonment, followed by four and a half years' probation. The court of appeals affirmed (Pet. App. A).

1. The evidence showed that in December 1974 petitioner, a financial consultant who specialized in obtaining surety bonds for construction firms, was engaged by Allegheny Contracting Industries, Inc. to obtain a $521,000 performance bond that was necessary to secure a construction contract between Allegheny and the Pennsylvania Department of Transportation (PennDOT). Petitioner succeeded in placing the bond through the Hul-Mar Insurance Agency of Camp Hill, Pennsylvania, which wrote the bond on behalf of the Wisconsin Surety Company in December 1974. Allegheny paid petitioner $15,000, of which $6,000 was a premium for the bond and $9,000 was a fee for his services (A. 164a-176a, 207a-208a, 698a, 824a).[2]

A problem arose, however, when PennDOT refused to accept one of the four companies reinsuring the bond because that company was not licensed in Pennsylvania (A. 698a).[3] Wisconsin Surety turned to petitioner for help in finding a substitute reinsurer. Wisconsin Surety's president prepared a new reinsurance document, termed an "offer and acceptance" (or an "O&A" in the insurance business). The O&A and a cover letter, both dated January 10, 1975, were then mailed to petitioner at the Mount Vernon Agency, Inc., 3001 North Fulton Drive, Atlanta, Georgia 30305 (A. 700a-703a, 1288a; Gov't Exh. 19, 19a). Petitioner agreed to locate another insurance company willing to execute the O&A and thereby accept part of the risk on the Allegheny bond. The transmission of the O&A and the cover letter to petitioner was the mailing alleged in the mail fraud count on which he was convicted.

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[1] Petitioner was acquitted on 33 other mail fraud counts, one count of participating in the conduct of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c), and one count of conspiring to commit the latter offense, in violation of 18 U.S.C. 1962(d). Co-defendant Morton Hulse was convicted on 16 mail fraud counts and on the two racketeering counts. He was sentenced to five years' imprisonment and a $20,000 fine. The court of appeals affirmed. *United States* v. *Hulse*, No. 77-2576 (3d Cir. Oct. 17, 1978). Co-defendant Charles Schatzman pled guilty to two mail fraud counts at a separate proceeding and was sentenced to three years' probation and a $1,500 fine. Co-defendants Ralph Puppo and Lloyd Davidson were acquitted on all counts.

[2] "A." refers to the joint appendix in the court of appeals.

[3] At the time the policy was written, Wisconsin Surety was not permitted to issue bonds in excess of $52,000 due to its inadequate capitalization. As a result, it was necessary for Wisconsin Surety to reinsure the $521,000 bond with four other insurance carriers to obtain adequate sources of indemnification (A. 696a-697a).

Shortly after the mailing, petitioner met with Daniel Culnen at petitioner's office in Miami, Florida. Culnen operated the C&H Insurance Agency of Bloomfield, New Jersey. Petitioner persuaded Culnen to execute the O&A on behalf of the Summit Insurance Company, even though petitioner knew Culnen's agency had been enjoined by a federal court from representing Summit (A. 371a, 376a, 381a-382a, 1264a-1265a). Culnen back-dated the instrument to make it appear that execution had occurred prior to issuance of the injunction (A. 411a). PennDOT received the executed O&A on January 16, 1975. The document bore the Summit seal and falsely represented that Summit had assumed a $176,000 reinsurance risk on the Allegheny bond (A. 1305a, 1308a, 827a).

2. Following petitioner's conviction, the district court granted him a new trial on the basis of newly discovered evidence. The evidence presented at the retrial consisted primarily of stipulated testimony from the first trial (A. 1209a). Petitioner was again convicted on the single mail fraud count.

Before the retrial began, petitioner moved to dismiss the indictment for abuse of the grand jury process (A. 950a-952a). Specifically, petitioner alleged that the evidence before the grand jury failed to support the allegation in the indictment that the O&A was mailed to him on January 10, 1975. Petitioner also asserted that critical information, concerning the address to which the documents were



mailed, was not provided to the grand jury (A. 951a-952a).

In support of these claims, petitioner observed first that Daniel Culnen inaccurately testified to the grand jury that he executed the O&A on behalf of Summit in May 1974, rather than in January 1975, the date alleged in the indictment (A. 436a, 481a-482a). Although Culnen later discovered that his grand jury testimony was incorrect and reported the error to the prosecutor, he did not reappear before the grand jury to correct his mistake (A. 490a-491a, 504a).[4] In addition, a postal inspector's report issued in March 1976 stated that in January 1975 the Mount Vernon Agency was no longer located at 3001 North Fulton Drive, Atlanta, Georgia, the address to which the O&A was mailed, and that no forwarding address for the agency had been filed with the post office (A. 1198a). The prosecutor did not know of this report until the retrial, and consequently it was not furnished to the grand jury (A. 1079a).

The district court denied petitioner's motion to dismiss the indictment. The court also denied a subsequent motion that suggested an *in camera* review of the grand jury minutes (A. 10a, 1207a).

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[4] At trial Culnen explained that when he testified before the grand jury he was misled by the date that he placed under his signature on the O&A to make it appear that the O&A was executed on May 10, 1974, while he was still an authorized Summit agent (A. 480a-481a, 601a, 605a).

## ARGUMENT

1. Petitioner contends (Pet. 7-13) that the indictment should have been dismissed because it was not supported by the evidence before the grand jury. This argument is incorrect. Evidence adduced at trial demonstrates that, despite Culnen's erroneous testimony before the grand jury concerning the date he executed the O&A, the grand jury had more than enough evidence before it to support the allegation in the indictment that petitioner induced Culnen to execute the document in January 1975.

Most important among this evidence were the documents themselves. Both the O&A and the cover letter addressed to petitioner were dated January 10, 1975. As the markings on these documents indicate, they were both grand jury exhibits (A. 479a-481a, 826a, 827a). Petitioner completely disregards these critical materials, which alone were sufficient to justify the grand jury's charge regarding the date of the O&A's execution. Moreover, as petitioner concedes (Pet. 5-6), the president of Wisconsin Surety testified before the grand jury that he thought the O&A and cover letter were mailed to petitioner in January 1975 (A. 951a).[5]

[5] The Wisconsin Surety president and an officer of Allegheny testified at trial that petitioner was responsible for procuring the necessary bond for the PennDOT contract, and that his efforts on Allegheny's behalf occurred during the late fall and winter of 1974-1975. See, *e.g.*, A. 84a, 171a, 693a, 698a. Petitioner was provided with a copy of the grand jury testimony of these witnesses, but he did not impeach their statements



The grand jury was thus presented with conflicting evidence concerning the O&A's execution date. It apparently did not credit Culnen's recollection on the subject, but instead resolved the conflict in favor of the documentary evidence and the testimony of Wisconsin Surety's president. This was a logical course for the grand jury to follow. Testimony by Culnen that he executed the O&A in January 1975 would have been tantamount to an admission that he participated in the fraud by acting as an agent for Summit when he lacked authority to do so. By naming Culnen as an unindicted co-conspirator (A. 61a), the grand jury evidenced its rejection of Culnen's testimony that he executed the O&A in May 1974. The O&A and cover letter, dated January 10, 1975, were mailed to petitioner, and officials of Allegheny testified before the grand jury that they spoke to petitioner when they were trying to obtain a surety bond in the fall of 1974. Taken together, these facts were sufficient to support the grand jury's decision to indict petitioner on the mail fraud count on which he was convicted.

Nothing in the record supports petitioner's assertion (Pet. 6, 12) that that count was drafted by an Assistant United States Attorney on the basis of Culnen's "off the record" statement after his grand

at trial concerning the timing of his bond procurement efforts. This omission strongly suggests that there was no inconsistency between the witnesses' grand jury and trial testimony. See *Costello* v. *United States*, 350 U.S. 359, 364-365 (1956) (Burton, J., concurring).

jury testimony. The indictment itself, signed by the grand jury foreman (A. 67a), indicates that the grand jury believed the O&A was executed in January 1975 and that petitioner was involved in the fraudulent transaction.[6]

Even if petitioner's claim were factually colorable, no relief would be warranted. *Costello* v. *United States*, 350 U.S. 359, 363 (1956), held that "[a]n in-

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[6] *Gaither* v. *United States*, 413 F.2d 1061 (D.C. Cir. 1969), on which petitioner relies (Pet. 8), is inapposite. In that case, it was fully established that the indictment was drafted by the Assistant United States Attorney and signed by the foreman, but that it was not considered by the other grand jurors who had heard the evidence. Here, there is no evidence that the grand jury was bypassed in the indicting process. *United States* v. *Estepa*, 471 F.2d 1132 (2d Cir. 1972), also does not aid petitioner. In *Estepa*, the court held that an indictment was defective where hearsay evidence was presented to the grand jury and the prosecutor misled the grand jurors into believing that they were receiving a firsthand account of the relevant events. The court also indicated that it would not sustain an indictment based on hearsay testimony where there is a high probability that the jury would not have indicted had eyewitness testimony been presented instead (*id.* at 1137). The court characterized its decision as a discretionary exercise of its supervisory authority, not prohibited by *Costello* v. *United States*, 350 U.S. 359 (1956) (471 F.2d at 1136). The Second Circuit has since limited the scope of its holding in *Estepa* to the precise circumstances of that case. See *United States* v. *Harrington*, 490 F.2d 487, 489 (2d Cir. 1973). Here, the indictment was not based on the hearsay testimony of a law enforcement officer, the nature of which was not revealed to the grand jury. Rather, the grand jury heard testimony from actual participants in the fraudulent scheme, and it examined the actual documents whose mailing formed the basis of the charge on which petitioner was convicted.



dictment returned by a legally constituted and unbiased grand jury, * * * if valid on its face, is enough to call for trial of the charges on the merits." This holding was reaffirmed in *United States* v. *Calandra*, 414 U.S. 338, 345 (1974), where the Court said that "an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence * * *." Accord, *Lawn* v. *United States*, 355 U.S. 339, 349 (1958). Petitioner does not contend that the indictment was either facially defective or returned by an illegally constituted grand jury. Accordingly, the district court did not err in refusing to dismiss the indictment and in declining to review *in camera* the evidence before the grand jury.

2. Petitioner also argues (Pet. 11-12) that the grand jury process was abused because the government allegedly concealed the postal inspector's report concerning the Mount Vernon Agency's change of address and failed to bring Culnen's erroneous testimony to the grand jury's attention. These contentions are without merit. As petitioner conceded at his second trial, the prosecutor was not aware of the existence of the postal inspector's report until the defense motion for a new trial was filed (A. 1079a). The Assistant United States Attorney thus could not have provided the report to the grand jury. In addition, despite petitioner's argument to the contrary (Pet. 12), the exculpatory value of this report is slim, as is reflected by the district court's conviction of petitioner at his second trial, after the report was

discovered. Even if the report had been presented to the grand jury, it would have done little to detract from the inference that petitioner, the addressee, actually received the O&A. The grand jury believed that Culnen executed the O&A in January 1975. Since the president of Wisconsin Surety testified that he mailed the document in unexecuted form, someone must have transmitted the document to Culnen. The logical assumption for the grand jury to make was that the person who performed that task was petitioner, the addressee of the January 1975 mailing.

Similarly, even if the prosecutor had reported the error in Culnen's testimony to the grand jury, this would not have assisted petitioner. Rather, it would only have resolved the conflict between Culnen's erroneous testimony and the other evidence tending to establish that the O&A was executed after its preparation and mailing in January 1975.[7] See *United States* v. *Bowers*, 534 F.2d 186, 193 (9th Cir.), cert. denied, 429 U.S. 942 (1976) (holding that a prosecutor's failure to notify the grand jury of a witness's perjury was harmless where the correct version of the testimony would not have exculpated the defendant).

[7] Petitioner's reliance (Pet. 11) on *United States* v. *Basurto*, 497 F.2d 781 (9th Cir. 1974), is misplaced. In that case the prosecutor was aware that perjured material testimony had been presented to the grand jury, and the court held that he had an obligation to apprise the grand jury of the perjury (*id.* at 785-786). Here, by contrast, correction of Culnen's erroneous testimony would not have tended to exculpate petitioner, and the prosecutor was simply unaware of the existence of the postal inspector's report.



Moreover, as the court of appeals held in *United States* v. *Guillette*, 547 F.2d 743, 753 (2d Cir. 1976), cert. denied, 434 U.S. 839 (1977), "where subsequent events merely cast doubt on the credibility of grand jury witnesses, due process does not require the prosecution to notify the grand jury of those events and seek a new indictment." See *Bracy* v. *United States*, 435 U.S. 1301 (1978) (Rehnquist, Circuit Justice);[8] *United States ex rel. Almeida* v.

[8] In *Bracy* v. *United States*, *supra*, defendants petitioned this Court for a stay on the ground that a grand jury witness committed perjury and the prosecutor failed to inform the defense and the district court when he learned of the perjury. In denying the application, Mr. Justice Rehnquist stated (435 U.S. at 1301-1302):

> [I]t seems to me that applicants misconceive the function of the grand jury in our system of criminal justice * * *. The grand jury does not sit to determine the truth of the charges brought against a defendant, but only to determine whether there is probable cause to believe them true, so as to require him to stand his trial. Because of this limited function, we have held that an indictment is not invalidated by the grand jury's consideration of hearsay, *Costello* v. *United States*, 350 U.S. 359 (1956), or by the introduction of evidence obtained in violation of the Fourth Amendment. *United States* v. *Calandra*, 414 U.S. 338 (1974). While the presentation of inadmissible evidence at trial may pose a substantial threat to the integrity of that fact-finding process, its introduction before the grand jury poses no such threat. I have no reason to believe this Court will not continue to abide by the language of Mr. Justice Black in *Costello*, *supra*, at 363: "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more."

*Rundle*, 383 F.2d 421, 424 (3d Cir. 1967) cert. denied, 393 U.S. 863 (1968). An indicted defendant has the opportunity for a full airing of all the facts at his trial. Once a valid indictment was returned, the Assistant United States Attorney was not required to apprise the grand jury of Culnen's corrections to his testimony or of the postal inspector's report. Viewed most favorably to petitioner, those items "merely cast doubt on the credibility" of the evidence already presented to the grand jury.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1978

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 276530 173

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1978 No. 78-363

MICHAEL GRASSO, JR., *Petitioner*

*v.*

UNITED STATES OF AMERICA

## REPLY BRIEF FOR PETITIONER

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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The Government attempts to becloud the issue by confusing in its Brief the evidence *before the Grand Jury* with the evidence later produced *at trial*. Petitioner does not claim here that the evidence *at trial* was insufficient or that the government suppressed *at trial* exculpatory evidence. Petitioner does claim that he was deprived of his Fifth Amendment right to indictment by grand jury because before the grand jury there was no evidence that he committed a crime, and exculpatory evidence was deliberately suppressed.

Daniel Culnen testified in his only appearance before the grand jury that he signed the O&A *in blank* on May 10, 1974 and sent it *in blank* to Wisconsin. The O&A was com-

pleted fraudulently at Wisconsin in January, 1975 and filed by Wisconsin with PenDot. *Culnen gave no testimony that it was completed fraudulently by Petitioner.*

Nevertheless, the Indictment supposedly issued by the Grand Jury, charges Petitioner, as follows (29a-30a):

> "15. It was further part of the scheme and artifice to defraud that after being notified of the unacceptability of Rural Mutual:
>
> a. that defendant MICHAEL GRASSO, JR., contacted Daniel Culnen to obtain reinsurance for the above stated Wisconsin Surety bond.
>
> b. that an offer and acceptance was mailed to defendant MICHAEL GRASSO, JR., by Eric Moss, President of Wisconsin Surety to be executed by the reinsurance carrier on or about January 10, 1975.
>
> c. that the offer and acceptance was executed by Daniel Culnen with the reinsurance carrier listed as Summit Insurance Company on or about January 17, 1975, despite the fact that as of July, 1974, Daniel Culnen was the subject of a court restraining order enjoining him from writing any surety bonds or reinsurance for the Summit Insurance Company and that as of January 17, 1975, the Summit Insurance Company was in the process of going into liquidation.
>
> d. that the offer and acceptance was returned to Hul-Mar, Inc., and H&S, Inc., and then submitted to Pendot."

There was, of course, no evidence before the grand jury that Grasso contacted Culnen to obtain reinsurance. Nor was there any evidence that Culnen executed the O&A on or about January 17, 1975, that Grasso solicited Culnen to execute the O&A at any time, nor even that Grasso knew Culnen had no authority to execute the O&A. In short, there was no evidence before the grand jury that Grasso had committed *any* offense in connection with the execution of the O&A.



What then was the basis for the allegations of the Indictment? It obviously was not Culnen's testimony. On the other hand, Culnen was the only person who could have provided the information which appears in the Indictment. Thus, the only possible basis of the Indictment was the "off the record" statement admittedly given by Culnen to the Assistant United States Attorney *after* he appeared before the grand jury. It is undisputed that the "off the record" statement was itself never presented to the grand jury.

Clearly, the Assistant United States Attorney bypassed the grand jury entirely and simply wrote this charge into the Indictment. Petitioner has alleged this fact at each stage of the proceedings *and it never has been denied by the government*. It is obviously the truth! Nevertheless, the government asks this Court to infer what the government knows *not* to be true, namely, that the grand jury inferred petitioner's involvement in the offense from a single scrap of other evidence with which it was presented.

The scrap of evidence is the testimony of convicted felon Eric Moss, former President of Wisconsin, that he "thinks" he mailed the O&A to Petitioner on January 10, 1975, addressed as follows (Gov. Exh. 19, 826a-29a):

> Mike Grasso
> MOUNT VERNON AGENCY, INC.
> 3001 North Fulton Drive
> Suite 809
> Atlanta, Georgia 30305

The proposed inference from this testimony alone is not only fictional, it is preposterous. No one could infer that Petitioner solicited Culnen to execute the O&A fraudulently simply from testimony that Moss "thought" he mailed the O&A to Petitioner. Such an inferential leap would bridge the light years between the simple mailing of a document to a person and the conclusion that such

person thereafter knowingly asked a third person to sign it in violation of a preliminary injunction. Let us assume, however, that with an uncanny ability demonstrated previously only by Sherlock Holmes, the grand jury could have made such an inference. The government ignores the fact that it concealed from the grand jury its knowledge that while Petitioner resided and worked in *Miami*, the O&A was sent to a *mis-address in Georgia with which Petitioner had no connection*. Furthermore, the government hid the fact that there was no forwarding address on file, a fact that would have led the grand jury to conclude that the O&A must have been returned by the postal service to the sender, who was Eric Moss at Wisconsin. This information corroborated Culnen's exculpatory testimony that someone at Wisconsin used a blank O&A previously signed and sent to Wisconsin by Culnen in 1974.

Could a grand jury have made the government's proposed inference in the face of this evidence that even if an O&A was mailed to Petitioner, *it was never received by him*? One thing is clear. Having deliberately suppressed this devastating exculpatory evidence, the government should not be heard to advance such a hypothesis.

The government seeks to dilute its responsibility for suppressing exculpatory evidence by casting the blame on a postal inspector who apparently kept it from the Assistant United States Attorney. The government fails to inform this Court, however, that this very same postal inspector was the prime investigator on the case, testified himself before the grand jury, and sat with the Assistant all during every day of the 4 weeks of the original trial. Although a primary defense of Petitioner was that he never received the O&A, this postal inspector maintained silence throughout.

It is true, of course, that at the second trial the government was able to satisfy the trier of fact that the letter



somehow got from Harrisburg to Georgia to Miami in January, 1975. However, this was the result of new evidence which also was never before the grand jury. The fact remains that *before the grand jury*, Petitioner was wholly innocent and the victim of governmental misconduct. The later events at trial can in no way justify the deprivation of the constitutional right to indictment.*

The government at several points argues that Petitioner has not proven that the Assistant United States Attorney, and not the grand jury, laid the charge in the Indictment. We believe this fact to be clear and inescapable; it is certainly undenied. In any event, the government ignores the fact that Petitioner *has never had a hearing* at which he could call the Assistant to the witness stand. Certainly, on this record, Petitioner was entitled *at least to a hearing*.

Not only has Petitioner never had a hearing, he has never had the benefit of even an opinion on this very substantial issue. Neither the District Court nor the Court of Appeals rendered one. This reflects the rigid Third Circuit view that there should be no inquiry into grand jury proceedings where an indictment is "regular on its face". As this case demonstrates, such a view has the practical effect

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*** At the second trial, the Government had to prove that the letter mailed on Friday, January 10, 1975, and received at PenDot on Thursday, January 16, 1975, somehow travelled from Harrisburg to the Georgia misaddress, to Petitioner in Miami, back to Harrisburg, and then to PenDot within 4 business days. The theory was that the letter arrived at the post office box of a Harry Walsh, who somehow got the letter to Petitioner in Miami. No direct evidence was presented in support of such theory. On the contrary, the defense called Harry Walsh, who denied ever receiving the letter or forwarding it to Petitioner. Nevertheless, the trial court accepted the government's theory. Unfortunately, this is not an appropriate forum in which Petitioner might argue the sufficiency of the evidence at trial.**

in the Third Circuit of conferring on the prosecution the constitutional power to indict. It is submitted that this state of affairs is both anachronistic and intolerable, and should be remedied by this Court.

Respectfully submitted,

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